

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 13, 2007

**TENNESSEE PHARMACY COALITION v. COMMERCIAL TEN**

**Appeal from the Chancery Court for Davidson County**  
**No. 04-1908-IV     Richard Dinkins, Chancellor**

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**No. M2005-01271-COA-R3-CV - Filed on April 24, 2007**

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An owner of a building sought a declaratory judgment regarding any obligations it had under a terminated building management agreement with a management company because the management company contended it was entitled to a broker's fee on any future sale of the building. The trial court ruled that the management agreement was unambiguous and clearly did not entitle the management company to any such commission under the undisputed facts. We agree and affirm the trial court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Robert John Notestine, III, Nashville, Tennessee, for the appellant Commercial Ten.

William Gary Blackburn, Sean Charles Kirk, Nashville, Tennessee, for the appellee, Tennessee Pharmacy Coalition.

**OPINION**

The Pharmacy Cooperative<sup>1</sup> ("TPC") entered into a Management Agreement with Commercial Ten on March 1, 2002, under which Commercial Ten was to manage the TPC office building in Nashville. TPC terminated the agreement effective October 1, 2003. There is no dispute the termination was effective and Commercial Ten ceased managing the building. The dispute centers on the interpretation of a provision of the agreement relating to a commission on the sale of

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<sup>1</sup>By the time of the lawsuit, this entity was known as, or did business as, the Tennessee Pharmacy Coalition. Thus, although the complaint was brought by Tennessee Pharmacy Coalition, the agreement at issue was made by the Pharmacy Cooperative. These discrepancies were brought to the trial court's attention who ruled they were the same entity.

TPC's building. Although nothing in the record indicates that the building was sold, certain communications between the parties after the agreement's termination led TPC to file this declaratory judgment action to declare the rights and obligations of the parties under the agreement.

The provision at issue states:

4. The owner further agrees:

c) Upon and after the termination of the agreement pursuant to the method described in Paragraph 1 hereof, Owner [TPC] shall recognize Agent [Commercial Ten] as the broker in any pending negotiations and<sup>2</sup> said premises, or any part thereof, and in the event of the consummation thereof Owner shall pay to agent a commission therefore at the rate prescribed on Paragraph 4(d) hereof.

d) To pay the Agent:

(2) The sale of the property a commission of 4% of the contract price.<sup>3</sup>

The letter from TPC's president terminating the Management Agreement was sent September 3, 2003. On September 8, the manager for Commercial Ten acknowledged the termination letter and stated its intention to move out of its office in TPC's building by October 1. The letter concluded, "Please review 4-c of our agreement. Anything we can do under this please inform us." TPC's lawyer responded with a letter stating, "Per section 4(c) of the Management Agreement, TPC states that it has no knowledge of any pending negotiation for the sale of the property." TPC requested that Commercial Ten provide it notice of any pending negotiations for the sale of the property that Commercial Ten knew about. The letter concluded, "all other obligations of TPC to Commercial Ten will expire in accordance with the prior notice of termination."

When TPC's attorney received no response within the time allotted, he sent another letter stating that since TPC knew of no pending negotiations and Commercial Ten had not informed it of any, "all obligations of TPC to Commercial Ten under the Management Agreement, including section 4(c) will expire with the termination date."

A month later, Commercial Ten's attorney responded, advising there was a difference of opinion as to the meaning of the language in paragraph 4(c) of the agreement. "Put simply, my client submits that the language of this paragraph entitles it to a commission upon the sale of the subject real property after the termination agreement." The letter explained that Commercial Ten had

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<sup>2</sup>Obviously, the word "and" should be something like "on" or "regarding." The parties' positions assume such a meaning.

<sup>3</sup>It would appear that "upon," or something similar, should precede this clause.

bargained for the commission provision and “when the subject property is sold by your client, my client will expect to receive its full commission.”

In June of 2004 TPC filed a Complaint for Declaratory Judgment asking the court to declare that TPC had no continuing obligation to Commercial Ten of any kind, including any duty to pay a commission associated with any future sale of the building. The Complaint alleged that Commercial Ten continued to assert that it is entitled to a four percent commission on the sale of the building into perpetuity regardless of Commercial Ten’s lack of involvement in procuring the sale; that the Management Agreement was unambiguous; that TPC never agreed to give Commercial Ten a perpetual right to a commission regardless of services performed; and since no negotiations for sale of the building were pending at the time of the termination, Commercial Ten was not entitled to any commission on any future sale.

Commercial Ten answered and, *inter alia*, admitted that the termination was made in accordance with the agreement and asserted that the Management Agreement “clearly and unambiguously” stated that TPC would owe Commercial Ten a four percent commission upon the sale of the building.

TPC moved for summary judgment and filed an affidavit of its president stating that at the time the agreement was terminated there were no pending negotiations to sell TPC’s building and there had been no such negotiations since the termination, but that TPC intended to market the building in the future and, therefore, needed to have Commercial Ten’s claims resolved.

Commercial Ten opposed the summary judgment on the basis there were genuine factual disputes and that the agreement clearly provided for a commission to Commercial Ten from any future sale. It also filed an affidavit of its manager stating that he had drafted the Management Agreement, that TPC’s then president had agreed to pay the real estate commission upon the sale of the building, and that TPC was misconstruing paragraph 4(c) because the language made Commercial Ten the broker for the building even after termination of the Management Agreement.

The trial court concluded that the Management Agreement was clear and unambiguous and that it was undisputed there were no “pending negotiations” to be “consummated” at the time of the termination. Consequently, the court granted summary judgment to TPC and declared that TPC had no further obligation to Commercial Ten for any commission on any future sale of the building.

On appeal, Commercial Ten asserts there is a patent ambiguity in the Management Agreement, contrary to its earlier position that the agreement was unambiguous. It also contends there are genuine issues of material fact that precluded summary judgment, specifically regarding the parties’ original intent as to the broker and commission provision.<sup>4</sup>

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<sup>4</sup>Commercial Ten also argues that the termination did not comply with the agreement. However, Commercial Ten admitted compliance in its Answer.

The question of interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, the trial court's interpretation of a contractual document is not entitled to a presumption of correctness on appeal. *Id.*; *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). This court must review the document ourselves and make our own determination regarding its meaning and legal import. *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

Our review is governed by well-settled principles. "The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The purpose of interpreting a written contract is to ascertain and give effect to the contracting parties' intentions. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999).

The intent of the parties is to be determined, in the first instance, from what they said they intended. Where the parties have reduced their agreement to writing, their intentions are reflected in the contract itself. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 at 85. "The intent of the parties is presumed to be that specifically expressed in the body of the contract . . . ." *Planters Gin Co.*, 78 S.W.3d at 890. Therefore, the court's role in resolving disputes regarding the interpretation of a contract is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used. *Guiliano*, 995 S.W.2d at 95; *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975).

Where the language of the contract is clear and unambiguous, its literal meaning controls the outcome of contract disputes *Planters Gin Co.*, 78 S.W.3d at 890. "It is incumbent upon this court to enforce contracts according to their plain terms." *Hardeman County Bank v. Stallings*, 917 S.W.2d 695, 699 (Tenn. Ct. App. 1995), *citing Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975).

In this appeal, Commercial Ten argues that summary judgment was improper because it was not allowed to present evidence about the intent of its manager when he negotiated, drafted, and executed the Management Agreement.

When a contract is unambiguous, parol evidence cannot be received to vary, add to, detract from, or contradict the terms of a document, or to modify its legal import. *Freeze v. Home Fed. Sav. & Loan Ass'n of Manchester*, 623 S.W.2d 104, 112 (Tenn. Ct. App. 1981). Known as the parol evidence rule, this rule is intended to protect the integrity of written contracts. *GRW Enterprises, Inc. v. Davis*, 797 S.W.2d 606, 610 (Tenn. Ct. App. 1990). Only where the contract is ambiguous, is parol evidence allowed to explain the written agreement. *Jones v. Brooks*, 696 S.W.2d 885, 886 (Tenn. 1985).

A contract provision is ambiguous if it is subject to more than one reasonable interpretation. *Planters Gin Co.*, 78 S.W.3d at 890; *Jones v. Brooks*, 696 S.W.2d at 887. In that situation, the parties' intent cannot be determined by a literal interpretation of the language and courts must resort

to other rules of construction. *Planters Gin Co.*, 78 S.W.3d at 890. Only if ambiguity remains after application of the pertinent rules does the legal meaning of the contract become a question of fact. *Id.* A strained construction may not be placed on the language used by the parties to find or create ambiguity where none exists. *Id.* at 891.

We agree with the trial court that the agreement at issue herein is unambiguous as to the conditions under which Commercial Ten is entitled to a commission on the sale of the building. TPC agreed to recognize Commercial Ten as the broker in any negotiations pending at the time of termination of the agreement and to pay a commission only upon the consummation “thereof,” *i.e.*, in any sale resulting from those pending negotiations.

There were no negotiations pending at the time the agreement was terminated. Consequently, Commercial Ten is not entitled to any commission should the building be sold in the future.

Commercial Ten was not entitled to present parol evidence about what its manager intended when he drafted the agreement. The only purpose of such evidence would be to attempt to vary the plain and unambiguous terms of the contract. Accordingly, we affirm the trial court’s grant of summary judgment.

TPC has asked this court to award it damages under Tenn. Code Ann. § 27-1-122 on the ground this appeal is frivolous. An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success. *Bursack v. Wilson*, 982 S.W.2d 341, 345 (Tenn. Ct. App. 1998); *Industrial Dev. Bd. v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). Because the broker provision of the agreement at issue herein is clear and its only reasonable meaning plain, we find this to be a frivolous appeal. We remand to the trial court to determine the expenses due under Tenn. Code Ann. § 27-1-122.

We affirm the judgment of the trial court and remand to the trial court for any necessary further proceedings. Costs on appeal are taxed to the appellant, Commercial Ten.

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PATRICIA J. COTTRELL, JUDGE